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In the Supreme Court of the United States

OCTOBER TERM, 1986

THREE WAY CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the Interstate Commerce Commission (ICC) abused its discretion in approving, without a hearing, a revised traffic pooling arrangement involving a household goods van line and its carrier agents.

1. United Van Lines, Inc. (United) is a nationwide common carrier of household goods. During the relevant period, it operated through 606 trucking company agents, 228 of which had their own separate grants of operating authority from the ICC.[1] For many years, United has functioned pursuant to an ICC-approved pooling agreement giving its carrier agents the option of operating to the full extent of their ICC licenses (*Geitz Storage & Moving Co.—Investigation of Control—United Van Lines, Inc.*, 65 M.C.C. 257 (1955)). Pet. App. 3a.

[1] Under this arrangement, United acts as a coordinator of services performed by its agents in an agency capacity. In return, United retains a small portion of revenues on shipments performed by agents on its behalf. The agents retain the balance of revenues (according to the services performed by each). Pet. App. 36a. An agent may be

In 1980, Congress enacted legislation that significantly changed the relationship between van lines and their agents. Under the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, and the Household Goods Transportation Act of 1980 (HGTA), Pub. L. No. 96-454, 94 Stat. 2011 *et seq.*, Congress made it easier for common carriers to obtain interstate moving authority and to expand their operations. Based on this legislation, a number of United's agents—including petitioners—obtained authority for nationwide carriage, thereby enabling them to use United's name, reputation, and services, while at the same time reserving for themselves the more profitable long-distance shipments that, in the past, would have gone to United. Pet. App. 3a-4a.

In early 1981, United announced that it intended to amend its pooling agreement, and in November 1983 it formally petitioned the ICC for such an amendment. The proposed amendment requires carrier agents to tender to United any shipment in excess of 1700 miles, regardless of whether the carrier agent holds an ICC license authorizing it to handle the shipment on its own. Pet. App. 4a-5a.[2]

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either an independent moving company, which does not hold an ICC license and therefore moves goods only under its van line's operating authority, or a carrier agent, which can perform household goods transportation both as an agent of the van line it serves and as a competitor of that van line. See generally *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 211-212 (D.C. Cir. 1986). Agents find it economically advantageous to affiliate with United because of its centralized dispatch operations, support services, marketing programs, and national reputation (Pet. App. 36a).

[2] Prior to the amendment, carrier agents could choose one of three methods of operation: the first allowed independent handling of shipments up to 750 miles; the second up to 1500 miles; and the third allowed unlimited mileage. The plan chosen by an agent determined the benefits it received under the agreement. Specifically, the more independent authority the agent exercised, the less assistance it received from United. Pet. App. 5a n.2, 36a-37a.

2. United's proposed amendment was reviewed by the ICC pursuant to new statutory standards enacted by Congress in the MCA and the HGTA. Whereas the ICC was previously required to conduct a hearing on all such proposals, see 49 U.S.C. (1976 ed.) 5(1), the MCA provides that the ICC "shall * * * without a hearing, approve and authorize" such agreements unless the agreement in question (1) is found to be of "major transportation importance" *or* (2) would "unduly restrain competition." 49 U.S.C. 11342(b)(1). See also 49 U.S.C. 11342(b)(3) (ICC "shall streamline, simplify, and expedite, to the maximum extent practicable," the review of proposed pooling agreements). The HGTA establishes a presumption that a pooling agreement is consistent with the public interest and is not a restraint on competition if it embodies pooling practices that are the same as or similar to the practices approved by the ICC prior to the enactment of that legislation (49 U.S.C. 11342(b)(2)). Applying the presumption, the ICC's Review Board found that United's proposed revision was not of major transportation importance and that there was no substantial likelihood that it would unduly restrain competition (Pet. App. 31a-49a). It therefore approved the revised pooling agreement without a hearing (*id.* at 46a-48a).

On appeal, the ICC's Appellate Division agreed that no hearing was necessary (Pet. App. 17a-29a). It explained (*id.* at 22a-23a) that United's proposal was simply a revision of its existing pooling agreement and therefore was not of major transportation importance. It further noted (*id.* at 23a-24a) that the modification would not unduly restrain competition but instead would increase United's ability to compete with other van lines.

The court of appeals affirmed (Pet. App. 1a-14a). It agreed with the ICC that the proposal was not of major transportation significance and there was no substantial likelihood that it would unduly restrain competition (*id.* at

6a-14a). The court rejected petitioners' claim that, because the ICC had conducted a hearing in another household goods pooling proceeding (*Atlas Van Lines, Inc.—Pooling Application,* 48 Fed. Reg. 11795 (1983)), it was required to do so here as well. The court explained (Pet. App. 9a) that Congress had directed the Commission to expedite the application process and, in light of the ICC's previous examination of an analogous household goods pooling proposal, the ICC could properly rely on "experience gained in the process of reviewing these matters." The court further observed (*id.* at 9a-10a) that United's proposal was actually less restrictive than a number of pre-HGTA agreements approved by the ICC and that it therefore "would be futile to set a hearing on United's petition when there exist [such] agreements that by [49 U.S.C.] 11342(b)(2) enjoy presumptive validity."

3. Petitioners contend (Pet. 11-17) that the court of appeals erred in not ordering the ICC to conduct a hearing on United's amended pooling arrangement. That claim is without merit. The ICC and court of appeals correctly ruled that the revised agreement was not of major transportation importance and that there was no substantial likelihood that it would unduly restrain competition. Accordingly, under 49 U.S.C. 11342(b)(1), no hearing was required or even permitted.

a. On the issue of transportation significance, the court of appeals correctly recognized (Pet. App. 10a) that United's amendment is very similar to its original pooling agreement. Although the original agreement permitted agents to operate to the complete extent of their ICC-granted authority, United's agents, at the time the agreement was drafted, were as a practical matter ineligible to obtain independent nationwide authority. Indeed, even after the enactment of the MCA, only four carrier agents elected to handle shipments of unlimited mileage. Pet. App. 5a n.2, 10a, 23a, 37a. Thus, United's amendment af-

fects very few carriers and leaves the competitive situation within its system essentially the same. The amendment therefore is not of major transportation importance.

b. With respect to the amendment's effect on competition, the ICC and the court of appeals correctly concluded (Pet. App. 12a-13a, 23a-24a) that the amended agreement will in no way reduce competition between United and other national van lines but instead will promote it by making United more efficient. United has simply eliminated a "free rider" problem, whereby an agent is able to select the most lucrative, long-haul traffic for itself and tender the less lucrative traffic to United, while continuing to reap the benefits of United's facilities, reputation, and marketing. See generally *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 212-213 (D.C. Cir. 1986).

Petitioners nonetheless contend (Pet. 13-14) that the rationale adopted by the court of appeals and the ICC on the issue of competitive impact contravenes Congress's intent under the MCA and the HGTA. Specifically, they claim (Pet. 13; see Pet. App. 11a-12a) that Congress sought to enhance the ability of carriers to expand their operations, and that the ICC and court of appeals therefore erred in focusing on competition between United and other van lines rather than on the competitive impact *among* United's carriers. That contention is without merit.

As the court of appeals recognized (Pet. App. 12a), petitioners have cited nothing in the MCA, the HGTA, or the legislative histories of those statutes to show that the ICC's focus on inter-firm competition in this case is erroneous.[3] Nor do they cite any court decision in support of their in-

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[3] An agency's reasonable interpretation of the statutes it is responsible for administering is, of course, entitled to judicial deference. See generally *United States* v. *Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-845 (1984).

terpretation.[4] Moreover, the interpretation advanced by petitioners is simply not persuasive in the context of this case. Indeed, the ICC did not conclude that intra-firm competition was statutorily irrelevant but only that the primary competitive issue *in the present case* was inter-firm competition (Pet. App. 24a (emphasis added)):

> [T]he most important source of competition *at issue here* is United's ability to compete with other, major van lines, rather than with its own agents. A number of other van lines do not permit their agents to hold any interstate operating authority, and thus face no internal sources of competition. To the extent that United's ability to compete with other van lines is adversely affected by competition with its agents, the purposes of the HGTA are thwarted rather than advanced.

This reasoning is entirely consistent with congressional intent. There is no evidence that, in deregulating the household goods transportation industry, Congress intended to preclude the kind of amendment proposed by United. To the contrary, Congress clearly sought to leave intact "the ability of a van line to reach agreements enforcing 'the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject matter of the agency.' " *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 597 F. Supp. 217, 232 (D.D.C. 1984), aff'd,

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[4] Petitioners rely (Pet. 9, 14) on a prior ICC decision, *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599, aff'd *sub nom. North American Van Lines, Inc.* v. *ICC*, 666 F.2d 1087 (7th Cir. 1981). But the portion of *Practices* upon which petitioners rely (132 M.C.C. at 632) involved a wholly unrelated issue of whether the ICC should repeal prior regulations (49 C.F.R. 1056.18, 1056.21 (1979)) governing rates that carrier agents could set when competing with van line principals. *Practices* in no way suggests that the ICC, in reviewing pooling agreements, should look at intra-firm competition rather than inter-firm competition.

792 F.2d 210 (D.C. Cir. 1986) (quoting S. Rep. 96-497, 96th Cong., 1st Sess. 8 (1979)). Thus, the ICC and court of appeals were entirely correct in focusing on inter-firm competition.

c. The ICC's determination that a hearing was not required is correct for two additional reasons. First, United's proposal was less restrictive than a number of other pooling agreements in the industry that had been approved by the ICC prior to the enactment of the MCA and the HGTA.[5] It was therefore entitled to a presumption of validity under 49 U.S.C. 11342(b)(2). Second, the futility of a hearing in this case is underscored by the proceeding in *Atlas Van Lines*. The van line in that case similarly sought to limit the independent operating authority that could be held by its carrier agents. The ICC concluded, after a hearing, that the Atlas proposal was not a matter of major transportation significance and that there was no substantial likelihood that the proposed modification would unduly restrain competition. As the court of appeals explained (Pet. App. 8a), the Atlas amendment affected a much larger number of carrier agents than United's proposal, yet the ICC ultimately approved that proposal as well. The ICC's findings in the *Atlas* proceeding demonstrate *a fortiori* that United's proposal does not merit a hearing and that one would have been futile.[6]

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[5] As the court of appeals noted, when the HGTA was passed, several van lines prohibited their agents from having *any* independent authority (Pet. App. 9a (citing authority)).

[6] For that reason, petitioners err in asserting (Pet. 14-15) that because the ICC held a hearing in *Atlas*, one was required here. The HGTA (49 U.S.C. 11342(b)(3)) directs the ICC to "expedite, to the maximum extent practicable," the approval of applications. As the court of appeals indicated (Pet. App. 9a), it "would not be in keeping with the HGTA to require the Commission to ignore experience gained in the process of reviewing these matters.". Petitioners further err in contending (Pet. 15-17) that the ICC's opinion in the present

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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case is somehow internally inconsistent and that a hearing should be ordered on that basis. Nothing in the ICC's opinion supports petitioners' claim that a hearing was either necessary or appropriate in this case.

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